

# Italy and United Nations conclude enforcement agreement

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Muslims. Already seven men have been convicted and sentenced while an additional four persons are in detention.

The Bosnian Muslim authorities have moved one trial to Sarajevo due to a concern that otherwise the trials would not meet the minimum standards of justice.

### 3. *The Role of the International Criminal Tribunal for the Former Yugoslavia*

The national trials are cases that the International Criminal Tribunal for the Former Yugoslavia (ICTFY) has decided not to prosecute. Nevertheless, various monitors from the global community are monitoring the cases.

In the Halilovic trial one U.S. monitor who relies on an interpreter is monitoring the proceeding.

While the ICTFY has the authority to intervene in the national war crime trials,<sup>21</sup> it does not have necessarily the resources to play a role.

Despite the weaknesses in the national systems of justice in the former Yugoslavia, the extremely limited resources of the ICTFY and its problems of bringing and finishing cases mean that the national trials seem the only alternative to no prosecution in more than 95% of the cases.

## C. Italy and United Nations Conclude Enforcement Agreement

by André Klip<sup>22</sup>

With regard to Italy, three documents now determine the enforcement of Tribunal sentences by that country: the Italian act,<sup>23</sup> the declaration expressing Italy's readiness to enforce and the agreement between Italy and the United Nations.<sup>24</sup> In the declaration, the Italian Government said that "the commitment of the Italian Government must be intended as limited to the acceptance of no more than 10 (ten) prisoners during the three years following the date of the present declaration."<sup>25</sup> Article 7 of the Italian Act provides for the recognition of Tribunal judgments, unless the judgement has not become final, the fact for which the judgment has been rendered is not regarded as an offense by Italian law or if for the same facts in respect of the same person a final judgment has been rendered by the State. The application of Article 734, paragraph 2 of the Code of Criminal Procedure means that both the procurator-general at the Court of Appeal as well as the convicted person may ask for review by the Court of Cassation. Article 7, paragraph 4 specifies that the Court of Appeal shall convert the term of imprisonment imposed by the International Tribunal into a term of imprisonment in Italy. The duration of the sentence (penalty) shall in no case exceed a term of thirty years. Article 8 deals with the enforcement which shall be governed by Italian law. The supervision as meant in Article 27 shall be carried out on the basis of agreements with the Prison

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<sup>21</sup> For the authority of the International Tribunal to intervene in national court proceedings, see Virginia Morris and Michael P. Scharf, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 121-36, especially 135-36 (1994).

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<sup>23</sup> See André Klip, *International Criminal Tribunal Yugoslavia, Legislation Enacted by Ten Different Nations on Judicial Assistance to the International Criminal Tribunal*, 11 INT'L ENFORCEMENT L.REP. 329.

<sup>24</sup> Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, The Hague, 6 February 1997.

<sup>25</sup> Letter to the Permanent Representative of Italy to the United Nations of 10 September 1996.



Administration department of the Ministry of Justice. Article 9 demonstrates that the initiative for pardon may come from the Minister of Justice. He may make a proposal to the Tribunal to decide pursuant to Article 28 of the Statute.

In the Agreement with the United Nations, Italy gave up some of the more autonomous powers expressed in the act. Crucial in the Agreement is Article 3 which stipulates that "in enforcing the sentence pronounced by the International Tribunal, the competent national authorities of the requested State shall be bound by the duration of the sentence." However, the conditions of imprisonment shall be governed by domestic law, subject to supervision as provided in Articles 6 to 8 and paragraph 2 and 3 of Article 9 of the Agreement. Italy thereby has allowed the International Committee of the Red Cross (ICRC) to inspect the conditions of detention and treatment at any time on a periodic basis. The ICRC will subsequently submit a confidential report based on the findings of these inspections to the Minister of Justice and to the president of the International Tribunal, who will consult each other. Article 3, paragraph 5 applies three standard rules on the detention of prisoners.<sup>4)</sup>

At first sight it seems to be rather strange that the ICRC has been entrusted with this task, having no experience whatsoever in supervising the treatment of prisoners in penitentiary institutions. The enormous expertise gathered by the ICRC under totally different circumstances; the treatment of prisoners of war in armed conflicts, does not qualify as a competent board of visitors. The situation in penitentiary institutions cannot be compared so easily to the situations for which the ICRC is competent under the Geneva Conventions. In addition to that, the law applicable to the detention of these prisoners, domestic penitentiary law and international criminal law is far away from the ICRC's core activities. A suitable alternative consists of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, very well experienced in supervising prison conditions. The convention by which this committee was established provides for a useful framework.<sup>5)</sup>

Article 3, paragraph 3, of the Agreement obliges the Minister of Justice to notify the president of the Tribunal in the case that the convicted person is eligible for non-custodial measures or working activities outside the prison, or is entitled to benefit from conditional release. Paragraph 4 provides for an automatic sanction when the President of the Tribunal, in consultation with the Judges, "does not consider that the application to the convicted person of one of the measures mentioned (...) is appropriate." In such a case the convicted person will be transferred to the International Tribunal. The absence of a discretionary power is astonishing. It does not seem consistent that the Tribunal could not agree to the measures in part. The Return of the convicted person to the International Tribunal will raise a number of practical and legal difficulties.<sup>6)</sup> Neither the Statute, nor the Rules of Procedure and Evidence provide a legal basis for such a request, or for the detention of convicted persons whose judgment is final.

For those convicted by the Yugoslavia Tribunal, Article 13 of the Dutch act provides for the detention in a Dutch prison of convicted persons waiting for the decision to designate a country and the subsequent transfer. Even the law of the host state does not provide for detention for returned convicted persons. Article 5 of the Agreement superfluously stipulates that the convicted persons shall not be tried before an Italian court for acts for which he has already been tried by the International Tribunal. This was already prohibited by virtue of Article 10, paragraph 1 of

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<sup>4)</sup> In the Erdemovic decision of 29 November 1996, the Tribunal had mentioned these three only among a whole series of other minimum standards of treatment of prisoners.

<sup>5)</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, European Treaties Series No. 126.

<sup>6)</sup> Although Article 10 does not mention to whom the convicted person will be transferred, it becomes clear from Article 3 that the drafters had a transfer to the International Tribunal in mind.



the Statute.

Article 7 of the Agreement between the United Nations and Italy obliges the minister of Justice to notify the Registrar: a) if the convicted person has deceased; b) if the convicted person has escaped from custody; c) if it is two months prior to the completion of the sentence. Notification in the situations under a and c seems logical, although raises the question on the basis of which law "the completion of the sentence" should be judged. Are Articles 3 and 8 of the Agreement of any relevance here? The situation of escape from custody, mentioned under b, raises follow-up questions that unfortunately have not been dealt with. Who is responsible for the rearrest of the convicted person and who will issue an arrest warrant? The answer to these questions is not only of practical relevance. The question is also whether such a prisoner should be regarded as a prisoner of the International Tribunal or of the enforcing state. Both choices have negative consequences. The first because the Tribunal has not been given any power in the Statute regarding convicted persons. In addition, the Tribunal may no longer exist by the time decisions should be taken. The second, because Italy then should obtain the presence of the convicted person on the basis of extradition law applicable with the state where the fugitive was found. The existence of many grounds for refusal (e.g., prohibition of extradition of nationals, double criminality) do not guarantee that the enforcing state will always obtain the extradition of the requested person.

Under the same conditions as mentioned in article 3, paragraph 4, the Minister of Justice shall notify the Registrar if the convicted person is eligible for pardon or commutation of the sentence.<sup>75</sup> Article 8 leaves the possibility that the final decision on pardon or commutation of a sentence shall be taken by the authority designated to do so in the enforcing state. The prerogative of the head of state is thus respected. In fact the Minister of Justice will make a proposal, to which the Tribunal will agree. Subsequently the official decision on pardon and commutation will be taken.

Article 9 deals with various aspects of the termination of the enforcement (death, completion, pardon). paragraph 2 gives the Tribunal the power "to terminate the enforcement in the requested State and transfer the convicted person to another State or to the International Tribunal." It can only be speculated which circumstances would qualify the application of Article 9. In comparison with three other ways for the Tribunal to end enforcement (Articles 3, 8 and 10) Article 9 must deal with the serious ill treatment or torture of the convicted person. The fact that this competence exists "at any time" implies that the Tribunal is not dependant on the enforcing states that the enforcement of the sentence shall cease following a decision as referred to in paragraph 2. Unlike the first three categories mentioning paragraph 1, which deal with the conclusion of the enforcement, the fourth category deals with a situation in which enforcement should continue. This becomes clear from Paragraph 2. What is intended is that enforcement will come to an end in one state that another state will take over at the same time. The fifth situation in which the Tribunal will resume power over the convicted person is found in Article 10. The local Minister of Justice shall inform the Registrar "if for any legal or practical reasons, further enforcement has become impossible." In such a case the Registrar has become impossible." In such a case the Registrar shall make arrangements for the transfer of the convicted person. Unlike Articles 3, 8, and 9, Article 10 does not specify to whom the person will be transferred.

The situations in which the Tribunal may take over are confusing. Articles 3 and 8 refer to Article 10, but Article 10 seems to cover also other situations not covered by Articles 3, 8, and 9. The President and the Judges do not seem to be involved in decisions that cover Article 10 only. Sometimes the President must be informed (Article 3, paragraph 3), sometimes the Registrar (Articles 8 and 10) and sometimes the Tribunal (who is that?) may take decisions *ex officio* (Article 9). Transfer of the convicted person may take place to the Tribunal (Article 3 and 8) to

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<sup>75</sup> It is unclear why the state should notify the President in Article 3 and the Registrar in Article 8. In both cases the President shall take a decision which will be communicated by the Registrar.



another state or to the Tribunal (Article 9) and with out a specific destination (Article 10).<sup>8)</sup>

The Agreement shall remain in force as long as sentences of the International Tribunal are being enforced by the requested State under the terms and conditions of the Agreement. It may be terminated by either party with two months prior notice. Article 13 further stipulates that termination may only take place when sentences have been completed or terminated and, if applicable, after the transfer of the convicted person as provided for in Article 10 has been effected.

## XI. INTERNATIONAL ORGANIZED CRIME

### A. European Ministers Adopt Resolution on the Links Between Corruption and Organized Crime<sup>9)</sup>

On June 10, 1997, the Ministers participating in the 21st Conference of European Ministers of Justice, Council of Europe, in Prague adopted a resolution on the links between corruption and organized crime.<sup>1)</sup> The resolution follows the adoption by the Committee of Ministers of the Council of Europe in November 1996 of the Programme of Action against Corruption.

The resolution sets the stage for initiatives against corruption and organized crime, including, insofar as they constitute a threat to democratic stability and security in Europe, at the Second Summit that will occur in Strasbourg, on October 10 and 11, 1997.

Among the recommendations, the resolution calls for a speedy ratification of the European conventions on *international cooperation in criminal matters* by the states that have not yet done so, especially ratification of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

The resolution calls for a review and update of the Council of Europe's instruments in the field of international cooperation in criminal matters to take due account of the new demands to combat organized crime and corruption.

The Council of Europe is called on to strengthen its work against corruption and organized crime, taking into account the work already done and underway in other international fora, especially the European Union, the United Nations and OECD. It is also tasked to promote the coordination of this action with these organizations.

The resolution calls for the support of the work undertaken by the European Committee on Crime Problems (CDPC), the European Committee on Legal Cooperation (CDCJ), and the Multidisciplinary Group on Corruption (GMC), aiming to elaborate international instruments against corruption.

According to the resolution, support should be given to the work undertaken by the CDPC relating to: (1) the legal and criminological aspects of organized crime with a view to facilitating the approximation of corresponding national qualifications in criminal law, the divergence of which limits international cooperation; and

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<sup>8)</sup> Under all circumstances, this requires that a new state will be designated.

<sup>9)</sup> We are grateful to Dr. Polychronis Pan. Tsiridis, Piraeus, Greece, who participated as a representative of the Greek Government, for bringing this matter to our attention.

<sup>1)</sup> Council of Europe, *Resolution No. 1 on the Links Between Corruption and Organized Crime*, Revised 2.A, June 10, 1997.